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IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

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IN RE GOOGLE INC. COOKIE : CIVIL ACTION  
PLACEMENT CONSUMER PRIVACY :  
LITIGATION :  
----- : NO. 12-MD-2358 (SLR)

- - -

Wilmington, Delaware  
Wednesday, October 24, 2012  
9:30 o'clock, a.m.

- - -

BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

- - -

APPEARANCES:

KEEFE BARTELS  
BY: STEPHEN G. GRYGIEL, ESQ.  
(Red Bank, New Jersey)

-and-

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-and-

Valerie J. Gunning  
Official Court Reporter

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15 Proposed Interim Co-Lead Counsel

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1 P R O C E E D I N G S

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3 (Proceedings commenced in the courtroom,  
4 beginning at 9:32 a.m.)

5

6 THE COURT: Good morning, counsel.

7 (Counsel respond, "Good morning, your Honor.")

8 THE COURT: Let's take some time to make  
9 some introductions and then we'll proceed. I'm not sure  
10 what you have in mind for me, but I certainly have some  
11 thoughts to share with you. So let's start with plaintiffs'  
12 counsel.

13 MR. GRYGIEL: Good morning, your Honor. Steve  
14 Grygiel from Keefe Bartels for the plaintiffs.

15 MR. STRANGE: Good morning, your Honor. Brian  
16 Strange from Strange & Carpenter for the plaintiffs.

17 MR. FRICKLETON: James Frickleton of Bartimu,  
18 Frickleton, Robertson & Gorney for the plaintiffs.

19 THE COURT: All right.

20 MR. STRAITE: Good morning, your Honor. David  
21 Straite, Stewart Law U.S., Wilmington, Delaware, for the  
22 plaintiffs.

23 MR. MURPHY: Good morning, your Honor. William  
24 H. Murphy, Jr., Baltimore, Maryland, for the plaintiffs.

25 THE COURT: All right.

1 MR. EICHEN: Good morning, your Honor. Barry  
2 Eichen, Eichen Crutchlow Zaslow, for the plaintiffs.

3 THE COURT: All right. Thank you.

4 MR. RYAN: Good morning, your Honor. My name is  
5 Mark Bryant. I'm from Kentucky, for the plaintiffs.

6 MS. ROARK: Good morning, your Honor. Emily  
7 Roark, Kentucky, for the plaintiffs.

8 MR. BARNOW: Good morning, your Honor. Ben  
9 Barnow for plaintiffs.

10 MR. HARKE: Good morning, your Honor. Lance  
11 Harke from Miami, Florida, also on behalf of the  
12 plaintiffs.

13 MR. STEWARD: Good morning, your Honor.  
14 John Steward from St. Louis, Missouri, on behalf of  
15 plaintiffs.

16 MR. ZAVAREEI: Good morning, your Honor. Hassan  
17 Zavareii from Washington, D.C. for plaintiffs.

18 MR. LYSKOWSKI: Good morning, your Honor.  
19 Andrew Lyskowski from Missouri for plaintiffs.

20 MR. CROCKER: Good morning, your Honor. Champ  
21 Crocker from Alabama for the plaintiffs.

22 MR. KAUFMAN: Good morning, your Honor. Richard  
23 Kaufman, Beaumont, Texas, for the plaintiffs.

24 MR. RUBIN: Good morning, your Honor. Michael  
25 Rubin of Wilson Sonsini for defendant Google.

1 MR. WEIBELL: Good morning, your Honor. Tony  
2 Weibell, for defendant Google.

3 MS. COLETTI: Good morning, your Honor. Susan  
4 Coletti from Fish & Richardson for defendant PointRoll.  
5 This is my co-counsel, Edward McNicholas, of Sidley &  
6 Austin, also for PointRoll.

7 MR. McNICHOLAS: Good morning, your Honor.

8 THE COURT: Good morning.

9 All right. I guess I'd like to share some  
10 thoughts with you and then have you react to them, and  
11 certainly if you are prepared to make some presentations, we  
12 can see whether they're in order.

13 I certainly agree that it is premature to put  
14 much of a scheduling order in place, but I do want to start  
15 out with some observations and to see if we can't start out  
16 on the same page.

17 Number one, I would propose the following in  
18 terms of a preliminary schedule.

19 Number one, I will endeavor to get the lead  
20 counsel issue resolved within the next 30 days, which is on  
21 or about November 21st. It's not really 30 days. It's four  
22 weeks.

23 I would propose that we put in an order that  
24 four weeks after that, the plaintiffs would have to file  
25 their consolidated Amended Complaint, and that's on or about



1 December 19th, 2012. That the defendants would then respond  
2 with an answer or other motion practice on or before  
3 January 22nd, 2014 -- 2013, and that we hold a status  
4 conference on January 30th, 2013, at 4:30.

5 Now, I understand by reading the joint case  
6 scheduling order that you all submitted, that the defendants  
7 believe that a motion practice is likely because of the  
8 standing issue. I only grabbed one complaint, class action  
9 complaint that was filed among the many that were filed, and  
10 unlike the Third Circuit case that the defendants cited  
11 where the claims asserted were negligence and breach of  
12 contract, the plaintiff, at least in this case, asserted  
13 statutory violations, which do not require injury. In fact,  
14 they just require violation to lead to the imposition of  
15 sanctions.

16 So I obviously have -- no one has seen the final  
17 version, but so long as my understanding is correct, that  
18 with statutory violations you don't need injury in fact, and  
19 as long as there's at least one of those asserted, I'm not  
20 confident that defendants' position is well-taken, that  
21 everything stands still until their motion practice is  
22 resolved.

23 Now, if they've got some kind of motion about  
24 the statutory violations that does not involve a factual  
25 investigation, then certainly we'll talk about that on

1 January 30th. But I just wanted to give you that for what  
2 it's worth.

3 So that at least moves us forward, gives me  
4 homework, gives you all homework. And we'll meet together  
5 with perhaps a better idea of how to move the case forward  
6 after that.

7 With respect to some of the positions that  
8 you all have taken in the proposal, just some observations.

9 Number one, I am amazed that there are pages and  
10 pages of discovery that plaintiffs believe -- they believe  
11 discovery is appropriate, and certainly it may well be, but  
12 we also need to put some judicious restraint on how far  
13 reaching discovery is, because we're all aware of the costs  
14 associated and burdens associated with it.

15 On the other hand, defendant uses the word  
16 "entitled" an awful lot. You have to understand that in my  
17 courtroom, that is not a word that I embrace with much  
18 enthusiasm; that there are very few things to which we  
19 are entitled. You're entitled to a fair process and I am  
20 bound to give it to you. But just be aware that that  
21 raises the hackles on the back of my neck when I see the  
22 word. I would appreciate it if you didn't use it on a  
23 regular basis.

24 So with respect to the other limits that you  
25 have talked about, the requests for admission,

1 interrogatories, everything else, I think that can wait  
2 until January, when we have a better idea. I've looked at  
3 some, and it strikes me that the defendants are being a  
4 little stingy on what all these plaintiffs can have versus  
5 what they can have, since there are only two defendants and  
6 there are multiple plaintiffs. But that's something we can  
7 talk about with a little more information and come to better  
8 decisions.

9           So those were my preliminary thoughts. And I am  
10 happy -- I apologize on the one hand for having everyone  
11 here when we couldn't put together a full scale scheduling  
12 order, but, on the other hand, I think it's helpful for you  
13 to understand who I am and how I approach case management.  
14 And it certainly is helpful for me to kind of see the  
15 graphics of what this case might turn out to be.

16           So you've got my first thoughts on this case,  
17 and certainly if the parties have presentations to make, I  
18 don't want to deprive you of making those presentations if  
19 you think it is helpful and will move the case forward and  
20 will help educate me, to some extent.

21           So from plaintiffs' perspective?

22           MR. GRYGIEL: Good morning, your Honor. Steve  
23 Grygiel.

24           With that from the Court, that you're asking if  
25 there's something that we might want to present, I'd like to

1 ask the Judge, is there something you would find, your  
2 Honor, particularly helpful for coming to a decision here on  
3 the 23(g) issue, which we think is of crucial importance,  
4 because there's an awful lot I think I've got ready to say,  
5 but I don't want to say anything if your Honor is not  
6 interested in hearing it.

7 THE COURT: Well, I am not sure. I mean,  
8 I have not necessarily been faced with exactly this sort of  
9 case. If you would like to give me the best of your  
10 presentation and just let me hear at least some of it, to  
11 see how much --

12 MR. GRYGIEL: Sure thing, your Honor.

13 Our group has been called the Grygiel Group,  
14 which would, of course, make my mother and father proud --  
15 I'm not sure I really deserve that nomenclature -- as  
16 representing 16 out of the 24 cases. And that took some  
17 work, your Honor.

18 As your Honor said in Outten, a consensual  
19 private ordering is something that the courts like to see.  
20 It's also important because it represents the ability of the  
21 lawyers who are doing that private ordering to reach  
22 consensus out of mayhem, to get agreement out of discord,  
23 and we did that.

24 Unlike the other group in this case, upon whom I  
25 cast no aspersions, our group did not start out as a

1 monolith. We started out as separate groups. Through the  
2 course of working after the JPML, we were able to bring  
3 California people into the fold. We were able to bring  
4 people from Illinois into the fold. That's Mr. Kristoff.  
5 We were able to bring people from Florida, that's  
6 Mr. Yantunis, into the fold, Mr. Shubb from New York. We  
7 were able to bring together a very large number of people  
8 that essentially recognized that the leadership structure  
9 that we were talking about, three people on the executive  
10 committee, Mr. Frickleton, Mr. Strange and I, and a six-  
11 member plaintiff steering committee would be appropriately  
12 sized and appropriately nimble and sufficiently effective,  
13 more than sufficiently well versed in the areas that count  
14 in this case properly to represent the class.

15 And as your Honor knows from the Outten case, it  
16 makes sense from a juris prudential standpoint, to be able  
17 to look at one group and say that group has not just the  
18 experience, but the most important criterion, the  
19 substantive knowledge of the area of law that is at  
20 issue.

21 Here, your Honor, that is three things.

22 Not only have we forged consensus and shown our  
23 ability a to lead a large group in an otherwise unwieldy and  
24 somewhat amorphous mass, we've done more than that. We  
25 understand this area of law very well. Why? From very

1 recent experience.

2 Bragging just a little bit, on page 43 of the  
3 transcript issued by Judge Davila in a recent motion to  
4 dismiss that Mr. Straite and I argued, he commended our  
5 pleadings in a case very similar to this one. It's the case  
6 against Facebook. Judge Davila called our pleadings,  
7 meaning our motions to dismiss as well as our complaint,  
8 very good, fantastic, very helpful to the Court. He said it  
9 was a great help to the Court to have pleadings of that  
10 caliber.

11 Now, he was complimenting, your Honor, both the  
12 defendant and the plaintiff, but the point is, there we have  
13 a case involving the same kind of claims we're going to have  
14 here, the general rubric being privacy. Specifically, the  
15 computer fraud and abuse act, the stored communications act  
16 and the wiretap act, as well as California state and common  
17 law causes of action. That's important because, of course,  
18 the terms of service that Google had incorporate California  
19 law. Mr. Strange is very well versed in California law, and  
20 I can assure the Court that after arguing the motion to  
21 dismiss, I, too, I think, am now quite adroit in the nuances  
22 of California privacy law.

23 We bring this experience that's not just  
24 experience in large cases, which everyone in this room has,  
25 but specific experience, as Judge Davila recognized, on

1 exactly the kinds of issues that are going to confront this  
2 course. It's recent and it's not just Facebook.

3 Mr. Strange, for example, is involved in the  
4 Hulu case, Hulu KISSmetrics, and the Path case are privacy  
5 rights cases. Mr. Frickleton is involved in the Facebook  
6 case. I'm in the Facebook case. Mr. Straite is.  
7 Mr. Eichen is. Mr. Murphy is. And Mr. Murphy is also an  
8 MIT graduate, so he brings a certain technological expertise  
9 to our lawyers side of the table that is usually found  
10 wanting.

11 There are 33 areas of law that are really going  
12 to count. In the first, and I bore my colleagues with this  
13 a lot, is the pleadings standards. Everyone says, well,  
14 Judge, we get it. It's all Twombly and it's all Iqbal. We  
15 get it. Specificity.

16 Well, no. Not so fast, for a couple of reasons.  
17 And if I appear like a wretched penitent here, your Honor, I  
18 don't mean to.

19 THE COURT: And before you go on, was everyone  
20 ready to have this sort of discussion today, because I am  
21 not sure I -- I'm not sure.

22 MR. BARNOW: If I might, your Honor, just to  
23 fast-forward, we are prepared, but I heard the Court, and I  
24 will probably get up after my colleague's presentation to  
25 say we rely on our papers because it's pretty much in there.

1 But we stand at the pleasure of the Court. But that's what  
2 I'm planning on saying at this point.

3 THE COURT: Okay. Well, I just want to make  
4 sure that you have a full and fair opportunity to respond  
5 here and that you were prepared to do so. So I appreciate  
6 that.

7 MR. BARNOW: Thank you.

8 THE COURT: I appreciate that. All right.

9 MR. GRYGIEL: I don't need to was on and bore  
10 your Honor, but I think the most important thing, your  
11 Honor, here on 23(g) is not just saying I've done a lot of  
12 the things in the past and I'm a good lawyer and other  
13 judges have said it. I think it is very important to show a  
14 Court that you know what you're talking about. Twombly and  
15 Iqbal, crucial.

16 The defendants are going to say no matter what  
17 we write in our pleadings, that you have not satisfied the  
18 standard of specificity set in those cases. I will simply  
19 make a couple of broad brush points. Twombly and Iqbal are  
20 very different cases. In fact, they set different tests  
21 which the Third Circuit has recognized and endorsed in  
22 Phillips versus County of Allegheny.

23 Very briefly, what does Twombly say? The  
24 pleadings need to be sufficiently specific to raise a  
25 reasonable expectation that discovery will produce evidence



1 of the required elements of the claim.

2 What does Iqbal say? The pleadings have  
3 to be sufficiently factually specific to raise the  
4 inference that the defendant is liable for the misconduct  
5 charged.

6 I think it's clear from that statement, which I  
7 submit is very accurate in distinguishing those two cases  
8 and the tests they impose, that the Twombly test is more  
9 lenient. That's very important. And it's not just  
10 important because Twombly and Iqbal are different. It's  
11 important because the Third Circuit in Phillips versus  
12 County of Allegheny has followed the Twombly test.

13 Your Honor yourself has actually followed the  
14 Twombly test in the recent Meres case, and your Honor also  
15 cited Ericsson versus Partis, a case two weeks after  
16 Twombly.

17 Why is that important? Because in this case, if  
18 you are not nimble and adroit about being able to address  
19 these pleading standards, you're going to be running afoul  
20 of the defendants' immediate foreseeable specificity  
21 arguments.

22 This Court has followed the Third Circuit  
23 approach very carefully. The Heckman case, the Illumina  
24 case, all show this Court, the District of Delaware,  
25 following the Third Circuit's test, which is more lenient

1 than other courts have sought to impose after reading  
2 Twombly and Iqbal.

3 So you've got to be pretty well up on the  
4 pleading standards and the Supreme Court cases and here to  
5 claim you're able to represent this class. You need to be  
6 up on the most recent Supreme Court cases, like Skinner,  
7 where the Court did not cite Iqbal and did not mention  
8 heightened specificity of pleadings, but the Court went  
9 back to what this Court has always used as the touchstone.  
10 Fair notice of the claim and the grounds upon which it  
11 rests.

12 The Delaware cases and the Third Circuit Federal  
13 cases boil down to an endorsement that Twombly made clear,  
14 its fair notice and the grounds upon which it's rests. Why  
15 do I say this? Because we understand that. We've been able  
16 to satisfy those in other cases. We understand the  
17 intricacies of these pleadings.

18 The next thing, your Honor, you've got to be  
19 competent about here are the substantive privacy rights  
20 violations, the statutory claims. Your Honor raised very  
21 interestingly at the outset the point of standing. And  
22 what the defendants will say, your Honor, and obviously  
23 they'll speak for themselves, they're very clever lawyers.  
24 What they're going to say is, well, Judge. You said  
25 standing doesn't require injury in fact for a statutory

1       cause of action.

2                   And the plaintiffs, your Honor, are going to  
3       say that Austin in the Third Circuit Respa case says just  
4       that in a statutory standing setting. But not really,  
5       Judge. There still has to be injury in fact for statutory  
6       standing.

7                   What you've got to be able to show this Court in  
8       order to be able to represent this class is that you  
9       understand there is no two-tiered standing requirement.  
10      There isn't money damages plus invasion of a statutory right  
11      that is protected by the congressional fiat.

12                  You need to be able to show this Court, as we  
13      can from Ninth Circuit cases like Edwards, where the Supreme  
14      Court justified certification after it was originally  
15      granted, the Gallis versus Google case, and the Third  
16      Circuit case I just mentioned, Austin, you need to be able  
17      to show the Court that the Court is right. That the  
18      defendants aren't right when they seek to impose a more  
19      stringent standing test that applies.

20                  The defendants will -- and I know this because  
21      I've done a lot of these cases -- they will say to the  
22      Judge, well, Judge, they've really got to show more injury.  
23      In these privacy cases, that is one of the great hobgoblins  
24      of the plaintiffs' bar, is showing there has been sufficient  
25      injury for some of the state law claims and some of the

1 common law claims.

2 And what they're going to say is there's just no  
3 injury. Apart from the invasion of the statutory protected  
4 right, we're going to be able to show injury. We have been  
5 able to learn through the course of our work with experts,  
6 through our preparation for this case and, for example, the  
7 Facebook case and the Path case, how private identifiable  
8 information of the kind we allege Google was getting and  
9 improperly getting, is marketable, how it is monetized.  
10 That is very important in terms of demonstrating competence  
11 to be able best to represent this class, which we submit we  
12 have.

13 If you're going to talk about, your Honor,  
14 representing a class that involves a case under the Wiretap  
15 Act, which, as you know from the complaint you looked at,  
16 basically everyone alleges in this case, you've got to know  
17 where does this requirement come in the Wiretap Act for a  
18 contemporaneous interception? It doesn't appear in the  
19 statute. Why has it been grafted, engrafted, onto the law  
20 concerning the interpretation of the Wiretap Act?

21 I think you have to know, as we do, that it  
22 comes from United States versus Turk, an old wiretap case  
23 that has nothing to do with the kind of technology we're  
24 talking about here. We're able to demonstrate to your Honor  
25 that the cases that will say you need a contemporaneous

1 interception are either badly reasoned, or to the extent  
2 they apply, that they should be overcome by the Councilman  
3 case in the First Circuit or the Miscavige case in the  
4 Seventh Circuit.

5 The point I'm making, your Honor, is you have to  
6 understand what is an intercept, what is the evidence of  
7 intent for a violation under the stored communications act  
8 and wiretap act? What is a device for the Wiretap Act?  
9 What is a facility for the stored communications act? We  
10 are intimately familiar with all of those things. And I  
11 think that's important because it demonstrates our  
12 competence to represent this class.

13 Finally, your Honor, the third general area of  
14 the law in which anybody purporting to represent a class in  
15 a case of this magnitude and a case of this importance with  
16 privacy rights that go back to Katz and Olmstead, those old  
17 Supreme Court cases about the expectation of privacy. If  
18 you're going to represent a class and you want it to be a  
19 class, you had really better understand Third Circuit  
20 doctrine on pleading law. I don't think, your Honor, it's  
21 just that easy as picking up a couple of cases and reading  
22 them.

23 We're very familiar with the Third Circuit law  
24 on class certification. It does not begin and end with  
25 hydrogen peroxide. As I'm sure your Honor is familiar with

1 the Comcast versus Berand case, which is now on appeal  
2 to the Supreme Court, I believe the Supreme Court took  
3 cert.

4 The issue there really is, do you have to  
5 satisfy a Daubert like standard of expert testimony at the  
6 class certification stage to show that damages are provable  
7 on a class wide basis? And if you do, is it Daubert in  
8 full, or is it Daubert light?

9 Well, let's look at what the Third Circuit has  
10 said about that.

11 THE COURT: And I'm not sure I want to hear --

12 MR. GRYGIEL: Okay.

13 THE COURT: I mean, you're making arguments  
14 that --

15 MR. GRYGIEL: Right. My point is simply to  
16 demonstrate, your Honor, we know the law on this area. I'm  
17 not walking in here, thumping my chest, nor are any of my  
18 colleagues, saying, Judge, we're really good lawyers.  
19 Appoint us to run this class. We really want to do it. We  
20 have a lot of lawyers. We have a lot of resources. We  
21 understand the law, I submit, second to none. We have  
22 recent experience on exactly these topics. And we have come  
23 together, demonstrating our ability to run a case and to  
24 organize a group, and we have done everything we can here to  
25 develop the private ordering that this Court has said is

1 important.

2 And I don't believe, frankly, your Honor, that  
3 it necessarily rewards the system when we impose systemic  
4 costs by awarding a failure to agree to a private  
5 conceptually ordered grouping of plaintiffs. That's what we  
6 sought to achieve. It's regrettable that we did not. But  
7 in this case, your Honor, I think the choice has to be made,  
8 and I'm ready to have the Court call balls and strikes on  
9 it.

10 I'm done, your Honor. Mr. Strange has a few  
11 things I know he would like to say well.

12 THE COURT: All right. Thank you.

13 MR. GRYGIEL: Thank you, your Honor.

14 MR. STRANGE: May it please the Court, your  
15 Honor, Brian Strange from Los Angeles. I appreciate the  
16 opportunity to be in your courtroom.

17 We argued that this case should be in Northern  
18 California, where Google was based, but I appreciate the  
19 fact that we're here in Delaware and look forward to working  
20 with your Honor.

21 I've had the pleasure of working at MDLs across  
22 the country, and I think there's a common thread that  
23 benefits both the class and the Court with respect to  
24 appointment of leadership. I think that the leadership  
25 slate needs to accomplish three main things.

1           The first is the ability to focus the case. The  
2           second is coordinating the plaintiffs' bar and organizing  
3           discovery. And the third is professionalism.

4           With respect to the ability to focus the case,  
5           that's primarily based on the knowledge of the law, as  
6           indicated by my colleague. And without further ado, I'm  
7           going to pass on that except for I will mention that last  
8           Friday, Judge Rogers denied in part a motion to dismiss on a  
9           very similar tracking case against Path, which is an  
10          application downloaded on the iPhone. And we also have  
11          reached a settlement in the Kissmetrics case before  
12          Magistrate Judge Beadler in San Francisco, which is another  
13          tracking case.

14          With respect to coordinating the plaintiffs,  
15          your Honor, we have a number of cases here, as I'm sure  
16          you're aware. We did reach out our side to the plaintiff,  
17          got him on board to help ease the burden on the Court.  
18          We've also coordinated with the State Court.

19          There's a pending State Court case in California  
20          before Judge Kramer in San Francisco and their counsel is  
21          here. We've organized with them, trying to coordinate their  
22          proceeding also.

23          With respect to discovery, my firm sent out  
24          preservation letters of the evidence in March of this year,  
25          and that's important I think in these types of cases.



1           One of the issues I wanted to address with your  
2           Honor with respect to the scheduling order is I think it  
3           might be productive after the appointment of lead counsel  
4           that we at least proceed to negotiate a DSI protocol and a  
5           protective order, because without those documents we're  
6           really not going to get anywhere for discovery.

7           And notwithstanding any motions that the  
8           defendants bring, I think those are areas that we can begin  
9           our communication with the defendants to try to get in place  
10          with your Honor. And the same I think with Rule 26  
11          conference. I don't know whether your Honor had felt that  
12          we should go forward with that, but that's a potential issue  
13          that might be addressed.

14          With respect to organizing the plaintiffs, your  
15          Honor, as you can see, there are a lot of firms here, so one  
16          of the jobs of lead counsel is to make sure that the case is  
17          prosecuted in an efficient manner. One of the things we do  
18          is require, at least I do monthly, time records from all the  
19          plaintiffs that are reviewed by lead counsel every month.  
20          And also we engage in weekly, at least bi-weekly conference  
21          calls with the plaintiffs' side to make sure that they're  
22          organized.

23          And another rule that I think is effective is  
24          that there has to be a meet and confer between the leads and  
25          the defense counsel before any motion is brought to your

1 Honor's Court with respect to discovery so that we don't  
2 have outliers getting in disputes with defense counsel and  
3 all of a sudden a motion to compel --

4 THE COURT: Well, trust me, there will be no  
5 motions to compel in my court. I will have regular  
6 discovery conferences and we'll work out discovery issues  
7 without piling more paper on my desk.

8 So I appreciate that. And there certainly needs  
9 to be communication between the parties before anything is  
10 brought to my attention, but just for your benefit, no  
11 motions without permission.

12 MR. STRANGE: Thank you, your Honor.

13 And then, finally, with respect to  
14 professionalism, I think all the lawyers here are of the  
15 highest caliber and I don't think you're going to have an  
16 issue in that regard. But I do believe that our slate will  
17 help move this case along in a professional manner and we  
18 have a great knowledge of the law.

19 Thank you, your Honor.

20 THE COURT: All right. Thank you very much,  
21 Mr. Strange.

22 MR. BARNOW: Good morning, your Honor. Thank  
23 you for the opportunity to be here.

24 As I said previously, I think the papers are  
25 comprehensive. We've given a lot to the Court, perhaps too

1 much. I do think all the issues that were touched upon to  
2 date, as eloquently as they may have been reaped or  
3 presented, are dealt with in the papers.

4 Unless the Court has any questions from me, I  
5 would just close, begin and close by saying that the people  
6 that we're traveling with here, the other attorneys in this  
7 case that we have, are all competent. They're competent,  
8 too.

9 We look forward to an appointment, should the  
10 Court deem it appropriate, and we'll work with attorneys  
11 that are co-appointed. Other than that, if the Court  
12 doesn't have any questions, that concludes my presentation.

13 THE COURT: All right. Thank you very much. I  
14 do not at this moment.

15 MR. BARNOW: Thank you, Judge.

16 THE COURT: And if anyone on defendants' behalf  
17 wants to speak on anything, this is the time to do it.

18 MR. RUBIN: Good morning your Honor. Again,  
19 Michael Rubin for Google.

20 We obviously have no substantive position on the  
21 23(g) issue other than to say that the more efficient  
22 process, their selecting a more simple structure is easier  
23 in our experience going forward, but we obviously take no  
24 position between the two camps.

25 With an observation to the structure that you

1 outlined at the beginning of the process, first, thank you.  
2 It's helpful. The only thought that we might have is that  
3 it's possible that the Amended Complaint could be  
4 extraordinarily lengthy.

5 It has happened, I've seen, that when lead  
6 counsel attempts to consolidate 21 complaints, sometimes  
7 they grow to much longer than any of the individual  
8 complaints, not only in length, but in number of claims.  
9 And five weeks over two holidays may be a bit of a challenge  
10 in responding to it. If that were the case and the order of  
11 the Court that comes out after this hearing is outlined the  
12 way your Honor suggested, we could approach the Court and  
13 discuss that.

14 THE COURT: All right. One question I had for  
15 you that was just brought up by Mr. Strange, and that is  
16 whether it makes sense for the parties to discuss an ESI  
17 protocol, protective order, and have some general discussion  
18 about scheduling regardless of the motion practice that you  
19 file, so that if having taken a look at the motion practice  
20 I decide that the case is going to move forward because I'm  
21 confident there's going to be at least something, even if  
22 the motion practice whittles it down somewhat.

23 So I guess I need your input on that.

24 MR. RUBIN: I certainly don't think it's a bad  
25 idea for the parties, once lead counsel is appointed for the

1 parties to get together and talk, and that in advance of  
2 whatever date ultimately we come in, whether it's the 30th  
3 or if it is a bit further than that based on whatever may  
4 occur, that we come in with positions.

5 If we're able to agree, which I certainly would  
6 hope we are, that's much easier for the Court, much easier  
7 for you, much easier for all of us, and so we would hope  
8 that would be the case. I don't see a reason not to do  
9 that, and if we disagree, we could present you with  
10 positions not unlike the way we did yesterday. That was a  
11 bit of a rushed process. It came sort of late Friday. But  
12 we could do it in a much more organized process once we have  
13 lead counsel. I'm not opposed to doing that. I don't see a  
14 reason why not, if it became -- I can't imagine it would be  
15 too burdensome to get it done.

16 THE COURT: All right.

17 MR. RUBIN: The other issue I wanted to raise is  
18 something also that Mr. Strange raised, and counsel for the  
19 California state class action is here, and I know that they  
20 did send you a letter.

21 THE COURT: Right.

22 MR. RUBIN: This may be premature to raise, but  
23 I don't think so. At least we've been asked by the judge,  
24 Judge Kramer in the California class action, to raise this,  
25 so I'm doing it at his request as well.

1           There was an order issued by that Court. We had  
2 moved to stay the case. He put an order in coordinating it  
3 with this MDL. I don't know if you've had an opportunity to  
4 review the proposed coordination order that we drafted with  
5 counsel for the plaintiffs in that matter.

6           THE COURT: I have not. I wasn't quite sure.  
7 I've never quite done that before. So I have not.

8           MR. RUBIN: I will admit that I haven't either,  
9 and it's essentially a pilot program that Judge Kramer is  
10 issuing. I will tell you, I don't think it would be much of  
11 a burden on this Court at all whatsoever. Essentially,  
12 what's happening in this court would map on to what would  
13 happen in the state class action literally with respect to  
14 discovery disputes and at a much more general level with  
15 respect to other matters.

16           And so we have a state -- we have, rather, a  
17 conference in that court on November 27th to update things,  
18 and there's no -- there has been no general action yet taken  
19 in that case. The complaint has been served, some  
20 discovery, but nothing has moved forward until there's  
21 action proceeding in this case.

22           THE COURT: All right. So basically it's an  
23 effort to make sure that if depositions are taken, they're  
24 not duplicative?

25           MR. RUBIN: It's even more coordinated than

1 that. All discovery would be the same. If depositions were  
2 taken, depositions would be admissible in both actions.  
3 There would be one lead questioner appointed. It would  
4 require coordination between whomever is lead counsel in  
5 this case with lead counsel in that case to make sure things  
6 were done effectively.

7 It would ultimately reduce the burden on the  
8 defendants, on Google, essentially, from having to be  
9 burdened by participating in two parallel class actions  
10 addressing essentially the same -- same transaction or  
11 occurrence.

12 THE COURT: Well, certainly, unless -- I take it  
13 at this point everyone is ready to move forward with that,  
14 and so I think it's my obligation to do what I can to make  
15 sure that the two cases move forward and reserve everyone's  
16 resources as much as we can.

17 I will take a look at it, and certainly if you  
18 think it needs to be reviewed at our January -- at this  
19 point, our January conference, then please put it on the  
20 agenda so that we can make sure that we move forward  
21 substantively in an appropriate way.

22 MR. RUBIN: Thank you. We appreciate that.  
23 Nothing further from us at this time.

24 THE COURT: All right.

25 Yes, sir?

1 MR. McNICHOLAS: Good morning, your Honor. Ed  
2 McNicholas from Sidley Austin on behalf of PointRoll.

3 I would just speak very briefly. We're involved  
4 in only two of the more than 20 cases here. And as we saw  
5 in the papers coming in from the various factions of the  
6 plaintiffs' attorneys, we saw the summary of the case, and  
7 their summary of the case is almost entirely focused on  
8 Google. The one we saw was Document 28, summarized a case,  
9 didn't even mention PointRoll, which normally is a good  
10 thing from a defendant's perspective, of course. But our  
11 concern is that we're going to have a complaint that's going  
12 to talk about Google and its competition with Apple and  
13 Facebook-like buttons and Google Plus, and PointRoll has  
14 nothing to do any of that. PointRoll is an ad serving  
15 company in King of Prussia. It just serves internet ads.  
16 It's not Google. It's a fraction of the size of Google.

17 And so that's why we were asking for appointment  
18 of a counsel to do a consolidated complaint against  
19 PointRoll, so that there would be a complaint against  
20 Google, a complaint against PointRoll. In doing this, we're  
21 trying to streamline things. We're not doing this to upset  
22 the schedule. The schedule could be the same for both. We  
23 don't have any great preference on the schedule of that. We  
24 could do everything in parallel so we're not going to upset  
25 the schedule in any way.



1 But hopefully it would define the issues with  
2 respect to PointRoll sooner. If there's a long complaint  
3 that talks all about Google and then mentions PointRoll at  
4 the end, you would dismiss us from that, probably, but then  
5 you'd give them leave to replete. We'd act to it. I want  
6 to cut to the choice and actually find out what the  
7 allegations against PointRoll are as opposed to the  
8 allegations against Google.

9 The big concern here, of course, is discovery.  
10 That long listing of discovery topics, ten of them only talk  
11 about Google directly, and actually on a practical matter,  
12 meaning more of them are only really focused on Google. And  
13 having a small company caught up in the type of discovery  
14 that's being contemplated here would be exceptionally  
15 burdensome for PointRoll.

16 Given that, I mean, the business of PointRoll is  
17 literally to create the Internet advertisements and serve  
18 them. People don't have PointRoll account. It's just --  
19 it's a different thing entirely.

20 And there's not much -- there's a passing  
21 suggestion that Google and PointRoll were somehow connected.  
22 I don't actually know the basis of that, the factual basis  
23 of this from my perspective. There's no connection between  
24 the two companies. In fact, PointRoll competes with Double  
25 Click, which is a Google subsidiary.

1           So it's about streamlining the issues, about  
2           focusing discovery. And the last bit is really about  
3           fairness.

4           The plaintiffs have raised Google's FTC  
5           settlement. That stemmed from the Google buzz social media  
6           platform, and then there has been a further action on that.  
7           And it talks about specific representations that Google was  
8           alleged to have made.

9           I will let that stick with my colleague for him  
10          to respond. I'm sure he will. But if PointRoll is going to  
11          be subject to an action, I would think it would be at least  
12          based on PointRoll's representations or lack thereof, not  
13          anything else. A lot of the complaint talks about things  
14          that Google said and then said PointRoll is liable, and  
15          that's not fair to a company like PointRoll.

16          And so we're trying to ask for a separate  
17          complaint, to focus the legal issues and to streamline the  
18          case, and we're -- on timing, we are very happy to go along  
19          in lockstep. We had suggested maybe going in front to, as a  
20          test case or whatever, but Google does not like that idea,  
21          and so we're very happy and we put in the scheduling order  
22          that we're very happy to stick with the schedule. We're  
23          just trying to figure out what the issues are with respect  
24          to PointRoll and to segregate those off from Google.

25          THE COURT: All right.

1 MR. GRYGIEL: I'm sorry, your Honor, if I might?  
2 I need one minute. May I have one minute?

3 THE COURT: Yes. I was going to ask someone  
4 from plaintiffs.

5 Are you done, sir?

6 MR. McNICHOLAS: I am, unless you have  
7 questions.

8 THE COURT: Let's hear from plaintiffs' counsel.

9 MR. GRYGIEL: Thank you, your Honor. Take a  
10 page from Mr. Barnow's book. We'll rest on our papers on  
11 the legal arguments about the separation of PointRoll.

12 I'd like to make three factual points. First, I  
13 just heard that PointRoll is a small company. I don't think  
14 that's quite so. PointRoll is a rich media advertisement  
15 company owned by Gannett, a very large --

16 THE COURT: Well, I really don't want to hear  
17 the legal argument.

18 MR. GRYGIEL: It's not legal; it's factual.

19 THE COURT: All right. What I want to hear  
20 is process, not legal or factual from this point. And if,  
21 in fact, the facts that are, the operative -- I'm looking  
22 at this case as though there's a basic set of operative  
23 facts.

24 MR. GRYGIEL: Yes, your Honor.

25 THE COURT: And at this point I'm not sure how

1 PointRoll and Google, whether those facts -- where the  
2 interception of those facts are.

3 If it's a very small slice of this huge pie,  
4 then it could be that in the future, I don't see why these  
5 two defendants should go forward in lockstep. So I'm not  
6 sure I want to address it today, although I'm sure you are  
7 prepared, because you seem very prepared to address anything  
8 and everything. But I want you to be thinking about that  
9 because, again in my courtroom, the F word is fairness, and  
10 it's not a bad thing that I am not necessarily going -- not  
11 all parties are created equal.

12 And so you all as plaintiffs need to think  
13 carefully about why this company is associated with Google  
14 and this litigation. The one complaint I picked up that I  
15 was looking at that only had statutory claims only had  
16 Google as a defendant.

17 So at this point I have not investigated the  
18 case enough to know what PointRoll's role in all of this  
19 was, but I just want you to think carefully about the  
20 process and whether these two defendants are created equal  
21 and should be put to the same burdens and schedule.

22 MR. GRYGIEL: That's exactly what I was going to  
23 say, your Honor, was that at this point, we believe there  
24 are efficiency goals and gains to be prospered by treating  
25 them both in the same case at the same time.

1 PointRoll, according to the guy who wrote the  
2 story, this fellow John Meyer, was running these scripts  
3 that were using the same code that the plaintiffs allege  
4 Google was using. And PointRoll's chief executive officer,  
5 a fellow named Rob Gattos, admitted later that we don't  
6 currently do that, but we did a limited test for a period  
7 where we were doing it.

8 So from a factual standpoint, there is  
9 sufficient indicia at this point, I think, your Honor, to  
10 keep them in the case, and I don't think there's any  
11 inefficiency from doing so. At the appropriate time, they  
12 can always move to sever or they'll answer a motion to  
13 dismiss like everyone else in the world. But there is a  
14 factual basis that links the two together is the point I was  
15 going to make.

16 THE COURT: Or their use of this code for a  
17 limited period of time.

18 MR. GRYGIEL: Right.

19 THE COURT: All right. Speaking of which, just  
20 let me say -- and you may sit down.

21 MR. GRYGIEL: Thank you, your Honor.

22 THE COURT: This is an observation to everyone,  
23 and particularly to defendants who said that -- let me just  
24 quote what you said, because I was fairly amazed.

25 "This matter will not be referred to a

1 Magistrate Judge for the purposes of exploring ADR." I've  
2 never been told that in a proposed scheduling order. So let  
3 me just say that if you all agree to an alternate form of  
4 ADR, I'm happy with that, but ADR is a required step in the  
5 litigation process, and absent agreement by the parties that  
6 you are taking it outside of court, it will be referred to a  
7 Magistrate Judge for purposes of ADR.

8 So I mean at this point I appreciate the fact  
9 that I understand there may be an issue. The plaintiffs  
10 know that I understand there may be an issue. I don't think  
11 that we can move the ball forward by any further discussion  
12 about PointRoll and its limited use of a code in the scheme  
13 of things. I think it's something we need to address after  
14 we have a little more information. All right.

15 MR. STRANGE: Your Honor, Brian Strange.

16 On just a housekeeping note, part of our motion  
17 was to consolidate two cases that were subsequently  
18 transferred by the panel. That's the -- that's the Dogga  
19 (phonetic) case and the Nobles case. So your Honor may  
20 consider issuing a separate order just consolidating those  
21 for pretrial purposes so we're all in the MDL today.

22 THE COURT: All right. Is there any objection  
23 to that further consolidation? I mean, are there papers  
24 here someplace?

25 MR. RUBIN: No. No. We are in favor of it.

1 THE COURT: All right. I will take care of  
2 that.

3 MR. STRANGE: Thank you.

4 THE COURT: All right, counsel. Thank you very  
5 much for your time and your patience. I appreciated being  
6 further educated on the manner. And I'm looking forward to  
7 moving the case along as efficiently and fairly as we most  
8 possibly can.

9 Thank you.

10 (Counsel respond, "Thank you, your Honor.")

11 (Court recessed at 10:15 a.m.)

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